No. 87-73 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KATHERINE B. NICHOLS, *et al.*,
Petitioners,
v.
DON RYSAVY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF CHICAGO TITLE INSURANCE COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, SAFECO TITLE INSURANCE COMPANY OF IDAHO, STEWART TITLE GUARANTY COMPANY, TICOR TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, TRANSAMERICA TITLE INSURANCE COMPANY, AND TITLE USA INSURANCE CORPORATION, AS AMICI CURIAE IN OPPOSITION TO PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Nine title insurance companies, *viz.*, Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, SAFECO Title Insurance Company of Idaho, Stewart Title Guaranty Company, Ticor Title Insurance Company, Title Insurance Company of Minnesota, Transamerica Title Insurance Company, and Title USA Insurance Corporation hereby respectfully move for leave to file the attached brief in opposition to the petition for a writ of certiorari in this case. Written consent to the filing of the attached brief was obtained from the attorney representing the petitioners and from nine of the attorneys representing various respondents, including the United States and the State of South Dakota. Copies of the consents that were received have been filed with the Clerk of this Court along with this motion and the attached brief. Written consents from the four attorneys representing the remaining respondents were requested, but

responses were not received. None of the attorneys denied consent.

The nine title insurance companies seeking to appear as amici curiae taken collectively have issued a large percentage of the title insurance in force throughout the western United States. Their principal function is to facilitate the safe, certain, and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders and others in the real estate that is the subject of those transactions.

The interest of the nine title insurance companies in this case arises because of their interest in the certainty and predictability of the laws affecting titles to and rights in real estate. The position advanced by the petitioners in this case calls into question the validity of the title of current landholders to more than one million acres of land in the western United States. Petitioners contend that certain fee patents issued by the United States are void and therefore did not pass title to purchasers of the land subject to those patents. If the petitioners are successful, then the legitimate expectations of current landholders, who acquired their land in good faith, would be threatened. The nine title insurance companies seek leave to file the attached brief as amici curiae in order to address this potential threat to the titles of current landholders.

Respectfully submitted,

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BRIEF OF AMICI CURIAE

INTEREST OF THE AMICI CURIAE

This brief is filed on behalf of nine title insurance companies [1] jointly appearing as amici curiae in this proceeding. The principal function of title insurance companies is to facilitate the safe, certain, and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders and others in the real estate that is the subject of those transactions.

The nine companies jointly appearing as amici curiae taken collectively have issued a large percentage of the title insurance in force throughout the western United States, and consequently have a direct interest in the stability of land titles in the region. This Court has long

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[1] The nine companies are Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, SAFECO Title Insurance Company of Idaho, Stewart Title Guaranty Company, Ticor Title Insurance Company, Title Insurance Company of Minnesota, Transamerica Title Insurance Company, and Title USA Insurance Corporation.

recognized the importance of such stability. *See, e.g., Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983) (*quoting Minnesota Co. v. National Co.*, 70 U.S. (3 Wall.) 332, 334 (1866)); *Arizona v. California*, 460 U.S. 605, 620 (1983); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924).

At issue in this proceeding are fourteen forced fee claims asserted by the petitioners in the Western and Central Divisions of the District of South Dakota. These forced fee claims are based on a policy implemented by the Secretary of the Interior from 1916 to 1920 during the second term of President Woodrow Wilson. Using the authority provided by the Burke Act, Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (1982)), which authorized the Secretary of the Interior to issue fee patents whenever he found that an Indian allottee was competent and capable of managing his affairs, the Secretary of the Interior issued fee patents to allottees he deemed competent regardless of whether the allottee had requested or applied for a fee patent. Officials of the Department of the Interior were directed to visit reservations and evaluate allottees individually to determine their competence.[2] The Secretary also issued fee patents to allottees of less than one-half Indian blood, and later to allottees of one-half Indian blood, without an individual determination of competency.[3]

The petitioners allege that they are successors in interest to allottees who received fee simple patents from the Department of the Interior during the 1916-20 period and subsequently transferred their lands or interests in

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[2] *See Indians of the United States, Investigation of the Field Service: Hearings by a Subcomm. of the House Comm. on Indian Affairs*, 66th Cong., 3d Sess. 61-62, 74 (1920).

[3] *See* "A Declaration of Policy," issued April 17, 1917 (quoted in J. Kinney, *A Continent Lost—A Civilization Won* 292 (1937)); Letter from the Commissioner of Indian Affairs to reservation superintendents, March 7, 1919 (quoted in L. Schmeckebier, *The Office of Indian Affairs* 153-54 (1927)).

their lands by sale or mortgage. They allege that the fee patents were issued by the Department in violation of constitutional and statutory requirements, and therefore that the patents were void and ineffective to pass title. As a consequence, they assert that the land should be returned to trust status under the control of the United States and that they are entitled to recover possession of the land covered by the fee patents, together with trespass damages for the time they were out of possession of the claimed land, despite the fact that the land covered by the patents is now held by innocent purchasers who acquired the land in good faith. Those purchasers include individuals, private entities, municipalities, and the State of South Dakota.

If the petitioners succeed in maintaining their claims against the current landholders, those landholders, who acquired their land in good faith with no notice of any defects in the fee patents issued by the United States Government more than sixty-five years ago, will lose their land. Moreover, many other landholders whose titles are traceable to the issuance of such fee patents could be threatened by other forced fee claims; the ownership of more than one million acres of land will be brought into question. Finally, if the petitioners' claims are upheld, purchasers of land covered by federal patents will not be able to rely on the validity of such instruments, even though they appear to be perfectly valid.

SUMMARY OF ARGUMENT

Petitioners have presented three questions for review by this Court: (1) whether the statute of limitations contained in 28 U.S.C. § 2401(a) applies; (2) whether the United States is an indispensable party to the forced fee claims; and (3) whether the forced fee patents are void. As this brief will demonstrate, none of these three questions warrants review by this Court. None of them involves conflicts either with prior decisions of this Court or with decisions of other courts of appeals. To the contrary, the determinations of the Court of Appeals below

are consistent with such decisions. Furthermore, the questions raised by petitioners are not important questions of federal law that have not been, but should be, settled by this Court. Finally, when the merits of the issues raised by the petitioners are examined, it is clear that the Eighth Circuit's determinations are correct.

ARGUMENT

I. THE APPLICATION OF 28 U.S.C. § 2401(a) DOES NOT MERIT REVIEW BY THIS COURT AND SECTION 2401(a) REQUIRES THE DISMISSAL OF THE CLAIMS AGAINST THE UNITED STATES

The application of section 2401(a) by the Court of Appeals below does not warrant review on a writ of certiorari. The decision represents a correct interpretation of a clearly-written statute and presents neither an important question of federal law nor a departure from "the accepted and usual course of judicial proceedings." Sup. Ct. R. 17.1(a). Moreover, the Eighth Circuit's determination that section 2401(a) applies is entirely consistent with the decisions of this Court and of other courts of appeals.

The petitioners contend that the statute of limitations contained in 28 U.S.C. § 2401(a) does not apply to their claims against the United States. Cert. Pet. at 20-21. Petitioners' contention is incorrect. Section 2401(a) provides that "[e]xcept as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues . . . ."

The plain language of section 2401(a) shows that it applies to "every civil action." In addition, the petitioners' legislative history argument is erroneous and has been rejected by other courts of appeals. As the Ninth Circuit has held, section 2401(a) did not simply consolidate pre-existing statutes of limitations, "it also created a general statute of limitations insofar as suits

against the United States are concerned." *Werner v. United States*, 188 F.2d 266, 268 (9th Cir. 1951). *Accord Walters v. Secretary of Defense*, 725 F.2d 107, 113 (D.C. Cir. 1983). Finally, the Ninth Circuit has specifically considered the applicability of section 2401(a) to actions concerning allotments, and held that there is no escaping "the conclusion that section 2401(a) applies to *all* actions brought under section 345 [of title 25], whether the relief requested is legal or equitable." *Christensen v. United States*, 755 F.2d 705, 707 (9th Cir. 1985) (emphasis in original). *See also Loring v. United States*, 610 F.2d 649, 650 (9th Cir. 1979). Thus, the six-year statute of limitations contained in section 2401(a) foreclosed the petitioners' claims after 1954 (six years after the enactment of section 2401(a)).[4]

II. THE CLAIMS AGAINST THE CURRENT LANDHOLDERS SHOULD BE DISMISSED BECAUSE THE UNITED STATES IS AN INDISPENSABLE PARTY

A. The Determination of the Court Below That the United States Is an Indispensable Party Does Not Conflict With This Court's Decision in *Poafpybitty* and *Hodel*

According to the petitioners, the Court of Appeals' determination that the United States is an indispensable

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[4] Petitioners' suggestion that the application of section 2401(a) to their claims would be inconsistent with the Indian Claims Limitation Act of 1982, Pub. L. 97-394, 96 Stat. 1976 (1982), is without merit and has already been answered by this Court's decision in *United States v. Mottaz*, 476 U.S. ——, 106 S. Ct. 2224 (1986). In *Mottaz*, this Court explained that the Indian Claims Limitation Act of 1982 tolls the statute of limitations for "many damages actions brought *by* the Federal Government" but that it is not applicable to actions *against* the federal government or to actions concerning the title to or possession of real property. *See* 106 S. Ct. at 2232 n.10 (emphasis in original). Inasmuch as the forced fee claims involve actions *against* (not by) the federal government and actions that seek the cancellation of patents and the return of possession of land (as well as damages), the applicability of section 2401(a) is not affected by the Indian Claims Limitation Act of 1982.

party conflicts with this Court's decisions in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), and *Hodel v. Irving*, —— U.S. ——, 107 S. Ct. 2076 (1987), which allegedly required the Court of Appeals "to give controlling weight to the policy of protecting allotments." Cert. Pet. at 13. Petitioners' arguments are without merit. *Poafpybitty* and *Hodel* are simply inapposite to the present case, which involves the indispensability of the United States to an action against non-federal defendants that is grounded upon alleged affirmative misconduct by the United States.

In *Poafpybitty*, the Court permitted Indian allottees who had executed an oil and gas lease that had been approved by the Acting Commissioner of Indian Affairs to bring an action against the lessee for the breach of the lease. The issue decided by the Court was not whether the United States was an indispensable party—an issue not even mentioned by the Court—but whether the restrictions that prevented an allottee from selling or leasing his land also prevented him from maintaining a legal action to protect his rights. *See* 390 U.S. at 372. The Court stated that both the United States and Indian allottees "were empowered to seek judicial relief to protect" allotments, *id.* at 369, and permitted the suit by the Indian allottees against their lessee to proceed.

There is no question that the petitioners in the forced fee claims were "empowered to seek judicial relief." They clearly were. The pertinent questions concern the identity of the parties to a judicial proceeding in which such relief is sought and the time frame within which such relief may be sought. Unlike *Poafpybitty*, which involved allegations of misconduct by the lessee but no allegations of impropriety by the United States or its officers, the forced fee claims involve allegations of misconduct on the part of the United States only; there is no question of wrongdoing by the landholders against whom the petitioners are seeking to pursue their claims in the absence of the United States. In *Poafpybitty*, there was no rea-

son for the United States to be a party to the action—the Indian allottees had the power to bring the action and the conduct of the United States was not at issue.[5]

Similarly, *Hodel*, which involved a claim against the United States premised upon the alleged unconstitutionality of a federal statute, is irrelevant. In that case, this Court held that heirs of deceased allottees had standing to pursue claims against the Secretary of the Interior based upon the deprivation by the United States of the decedents' constitutional rights, and noted that the Secretary of the Interior "could hardly be expected to assert" those rights. 107 S. Ct. at 2081. That language has no bearing on the issue of whether the United States is an indispensable party in the context of the forced fee claims.

B. The Court of Appeals' Determination That the United States Is an Indispensable Party Was Correct

The Court of Appeals below properly analyzed the factors pertinent to whether the United States is an indispensable party. Rule 19(b) of the Federal Rules of Civil Procedure governs such determinations and sets forth four factors that courts are to consider. In evaluating these factors, the Court of Appeals followed the guidance provided by this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), and affirmed the judgments of the district courts that the actions should not proceed without the United States. *Provident Tradesmens Bank* explained that the determination under Rule 19(b) of "whether, in equity and good conscience," an action should proceed without a party involves four interests:

> First, the plaintiff has an interest in having a forum . . . . Second, the defendant may properly wish to

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[5] The petitioners' reliance on *Heckman v. United States*, 224 U.S. 413 (1912), is misplaced for similar reasons. *Heckman* involved an action challenging a subsequent transaction between the allottee and a purchaser rather than alleged misconduct on the part of the United States.

> avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another . . . .
>
> Third, there is the interest of the outsider whom it would have been desirable to join . . . .
>
> Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.

390 U.S. at 109-11.

The Eighth Circuit faithfully applied *Provident Tradesmens Bank* in reaching its decision below. Accordingly, the Eighth Circuit's decision does not constitute a decision on "an important question of federal law which has not been, but should be, settled by this Court," nor does it represent a departure from "the accepted and usual course of judicial proceedings" so as to justify review on a writ of certiorari. *See* Sup. Ct. R. 17.1. The application of Rule 19(b) in a particular case necessarily depends on the specific facts of that case, and both the Court of Appeals and the district court below carefully considered the specific facts and circumstances of the forced fee claims in reaching their decisions that the United States is an indispensable party. It would not be a wise use of the Court's certiorari power for the Court to engage in yet another review of the specific facts of the forced fee claims in the context of Rule 19(b).

Furthermore, when the four interests described by this Court in *Provident Tradesmens Bank* are evaluated, it is clear that the decision of the Court of Appeals below is correct. With respect to the first factor, the interest of the plaintiff in having a forum, it is true that the petitioners will have no forum in which to air their claims if the United States is held to be indispensable. This alone, however, does not preclude a finding that the United States is an indispensable party because Rule 19 does not require that this factor be given controlling weight. *See generally*, 7 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1608 (1986). Moreover, the reason that the petitioners would not have an-

other forum is simply that they have waited too long to bring their claims. If they had brought them within the applicable period of limitations—*i.e.*, prior to 1954—they could have joined the United States in an action in a federal district court or could have brought an action against the United States in the Court of Claims to recover damages based on the allegedly wrongful issuance of the fee patents by the United States. Thus, the reason the petitioners have no other forum is not because no such forum ever existed, but because they did not avail themselves of the relief available within the prescribed statutory period.

With respect to the remaining three interests—the defendant's desire to avoid multiple litigation, inconsistent relief, or liability he shares with another, the interest of the outside party, and the goal of complete, consistent, and efficient settlement of controversies—the Court of Appeals below evaluated these interests properly in holding that they weighed heavily in favor of determining that the litigation should not proceed without the United States. The results sought by the petitioners—the cancellation of the fee patents at issue and return of the land to trust status under the control of the United States—clearly require the presence of the United States for a final and complete resolution of the controversy.

First, it would be unfair to subject the non-federal defendants to the risk of losing their property as a consequence of allegedly wrongful action engaged in solely by the United States, particularly when those defendants have no assurance of receiving any recovery against the United States in the event the forced fee claimants prevail against them. While the non-federal defendants may be able to pursue damage claims against the United States in the event that forced fee claimants prevail against them, the outcome of any such actions is uncertain. Apart from whatever other defenses the United States may have in such a proceeding brought by the non-federal defendants in the United States Claims Court, the United States would be free to relitigate before the Claims Court the issue of the validity of the forced fee

patents, since the United States would not be bound by a contrary determination made in litigation between the forced fee claimants and the non-federal defendants. This creates the possibility that a federal district court could determine that the United States acted illegally when it issued the forced fee patents, and impose ejectment or damages on the non-federal defendants, while the Claims Court could determine that the United States acted properly in issuing the forced fee patents and deny recovery against the United States, thereby forcing the non-federal defendants to bear the consequences of what one court determined to be the United States' wrongful conduct even though they were fully justified in relying on a federal fee patent as evidence of good title to the land. Rule 19(b) was developed to avoid precisely this sort of multiple litigation with its potential for inconsistent judicial determinations. To allow the instant claims to go forward in the absence of the United States raises the possibility that the non-federal defendants would bear all of the liability while the only alleged wrongdoer, the United States, escapes all liability.

Secondly, permitting these forced fee claims to proceed in the absence of the United States would contravene the longstanding doctrine barring collateral attacks on land or mineral patents issued by the federal government. This doctrine confirms that the United States is an indispensable party because it requires that attacks on the validity of federal patents be brought in direct proceedings against the United States. As this Court held in *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636 (1882), "a patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land." 104 U.S. at 646. The protection afforded a federal patent is so strong that a patent may not be attacked in a court of law even if the officers issuing the patent "took mistaken views of the law." *Id.* at 647.

There is an exception to the general prohibition against collateral attacks for patents that are considered void. *See id.* at 641-45; *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. 447, 452-53 (1882). As the Court of Appeals below found, however, the alleged errors by the Secretary of the Interior render the forced fee patents "possibly voidable," but not void. Pet. App. at 28-30. Inasmuch as that conclusion follows directly from the principles enunciated in decisions of this Court, the Eighth Circuit's determination that the forced fee patents are not void does not warrant review on a writ of certiorari. Moreover, as will be discussed below at 14-20, the issuance of the forced fee patents was wholly consistent with both the Burke Act and the Constitution, and consequently forced fee patents are not even voidable, let alone void.

In finding the forced fee patents to be only "possibly voidable," and not void, the Court of Appeals below applied long-standing principles of law that have been developed by this Court in decisions such as *Moran v. Horsky*, 178 U.S. 205 (1900), and *United States v. Schurz*, 102 U.S. 378 (1880). In *Moran*, this Court held that a patent was only voidable, not void, when no invalidity appears on the face of the patent or from matters subject to judicial notice, and the land covered by the patent is within the jurisdiction of the Land Department. *See* 178 U.S. at 212. Similarly, in *United States v. Schurz*, this Court stated that a patent is void only if the land is outside the jurisdiction of the government; otherwise the patent is merely voidable, even if the Land Department made errors in deciding questions of law or fact. *See* 102 U.S. at 400-01.

Application of these principles demonstrates that errors such as those alleged to be present in the issuance of the forced fee patents could not render such patents void, but only voidable. The Secretary of the Interior clearly had jurisdiction over the land for which the fee patents were issued to allottees and acted "within the scope of his authority" under the Burke Act when he issued those patents. The Burke Act explicitly author-

ized the Secretary to issue a fee patent "whenever he shall be satisfied" that an allottee was competent. While the Secretary may have made errors of judgment when he concluded that certain allottees were competent, such errors do not negate the Secretary's authority to issue fee patents under the Burke Act. Moreover, the alleged errors—issuing a patent absent an application or an individual determination of competency—could not possibly be apparent on the face of the patent. The proper remedy for correcting supposed errors of judgment is by a direct proceeding against the United States, not by a collateral attack against the titles of current landholders. Permitting such a collateral attack would destroy the "unassailable character" of the federal patents at issue, "a character which gives to [a patent] its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of lands it embraces." 104 U.S. at 641.[6]

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[6] The Eighth Circuit's decision is also supported by the recent decision of the Tenth Circuit in *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987). In *Navajo Tribe*, the tribe brought an action against the United States and other parties to affirm its title to certain unallotted lands. After upholding the dismissal of the action against the United States, 809 F.2d at 1464, the Court of Appeals held that the claims against the non-federal defendants must be dismissed because the United States was an indispensable party. The Tenth Circuit identified several factors that supported its conclusion, including: (1) that the claims were based on documents of title derived from the United States; (2) that the plaintiff sought to cancel all such instruments; and (3) the principle that all parties to an instrument must be present for an instrument to be cancelled. *Id.* at 1472. All of these factors are present in the context of the forced fee claims and similarly compel a finding that the United States is an indispensable party.

Also, as the Tenth Circuit stated in *Navajo Tribe*, cases such as *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984), which have held the United States not to be an indispensable party in litigation concerning Indian lands, are inapposite because in those cases "the interest of the United States was aligned with that of the Indians." 809 F.2d at 1473. In contrast, in the forced fee claims, as in *Navajo Tribe*, the Indian claimants and the United States are adversaries.

C. 25 U.S.C. § 345 Does Not Indicate That the United States Is Not an Indispensable Party to the Forced Fee Claims

In *United States v. Mottaz*, 476 U.S. ——, 106 S. Ct. 2224 (1986), this Court stated that the United States need not be a party defendant "in *all* cases brought under § 345 [which provides federal district courts with jurisdiction over actions concerning allotments] . . . because the United States would obviously not be a proper party in many private disputes." 106 S. Ct. at 2231 n.9 (emphasis in original). It does not follow, however, from the Court's statement that the United States is not indispensable in *all* section 345 cases, that the United States is not an indispensable party in this case. As the Court of Appeals below properly held, section 345 does not indicate that the United States is not an indispensable party with regard to the forced fee claims. Pet. App. at 38-39.

The essence of the plaintiffs' claims in the forced fee cases is that the United States itself acted improperly in issuing fee patents. In contrast to the two cases cited by this Court in *Mottaz*, the forced fee cases do not involve claims of improprieties involved in the subsequent transfers to private landowners.[7] While the United States

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[7] Neither of the two cases cited by this Court in *Mottaz* is instructive in the context of the forced fee claims. The first case, *Begay v. Albers*, 721 F.2d 1274 (10th Cir. 1983), involved suits by two Indian allottees who alleged that their allotments had been transferred by means of forged deeds. The United States was a party to the actions along with the private landowners, originally as a party defendant, and subsequently as a plaintiff after it was realigned. The second case, *Vicenti v. United States*, 470 F.2d 845 (10th Cir. 1972), *cert. dismissed*, 414 U.S. 1057 (1973), concerned an action brought by Indian allottees (or their descendants) against both the United States and private landowners. The plaintiffs alleged that they had never received certain lands in exchange for which they had surrendered their allotments. The private landowners settled the claims against them before trial, however, and the United States was the only defendant at the time of judgment. Since the private landowners had settled out before trial, the Tenth Circuit's decision in *Vicenti* did not involve a dispute be-

may not be a necessary party in cases involving alleged improprieties in the transfer of land from an Indian allottee to another landowner, it is certainly a proper and necessary party in cases where the claim is bottomed on an assertion that the United States acted wrongfully in issuing a fee patent to an Indian allottee. *See McKay v. Kalyton*, 204 U.S. 458, 469 (1907) (United States must be made a party to controversies where the operation of legislation concerning allotments is at issue); *Antoine v. United States*, 637 F.2d 1177, 1181 (8th Cir. 1981) ("determining whether an Indian should have received a patent for an allotment of land under section 345 requires the presence of no party other than the United States").

Thus, while one can visualize numerous private disputes between Indian owners of allotments and private parties where involvement by the United States would not be indispensable or even appropriate—for example, when an Indian allottee sold land and did not receive the bargained-for consideration—the question presented in these proceedings is whether the forced fee claims constitute the kind of "private disputes" to which the United States would not be a proper party. The answer to that question is clearly negative. It would be inappropriate to resolve a dispute such as the forced fee claims, where the actions of the United States are the focus of the controversy, in the absence of the United States.

III. THE ISSUANCE OF FORCED FEE PATENTS WAS AUTHORIZED

The Court of Appeals below did not reach the merits of the forced fee claimants' challenge to the validity of the fee patents. The petitioners nevertheless contend that the Secretary of the Interior was not authorized by the Burke Act to issue fee patents without an application by the allottee and an individual determination of the allottee's competency, and that consequently such patents

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tween Indian allottees and private landowners; the decision involved only a dispute between Indian allottees and the United States, and, of course, the United States was a party to the suit.

are void. Cert. Pet. at 17-19. When the merits are examined, however, it is clear that the forced fee claims have no basis and should be dismissed for that reason as well as by virtue of the statute of limitations and indispensable party grounds relied upon by the Court of Appeals.

A. Neither the Burke Act Nor the Constitution Required the Application or Consent of the Allottee to the Issuance of a Fee Patent in Order for the Fee Patent to Remove Restrictions on Alienation Applicable to the Allotment

As one of the district courts below held, Pet. App. at 68-81, the text of the Burke Act contains no requirement that a fee patent be issued only upon the application or with the consent of an Indian allottee. The relevant portion of the Act provides:

> [T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple . . . .

25 U.S.C. § 349 (1982). This language authorizes the Secretary of the Interior to issue a fee patent whenever he is satisfied that an allottee is competent and capable of managing his or her affairs. It contains no application or consent requirement.

The legislative history of the Burke Act contains nothing that contradicts the plain meaning of the statutory language. The House and Senate reports that accompanied passage of the Burke Act are virtually identical and give no indication that application or consent by the allottee was required. *See* H.R. Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906); S. Rep. No. 1998, 59th Cong., 1st Sess. 2 (1906). The floor debates accompanying passage of the Burke Act similarly provide no support for a consent requirement. *See* 40 Cong. Rec. 3552-601 (1906).

During the same period when the Burke Act was enacted, Congress passed several other acts authorizing the

issuance of fee patents (or in some cases certificates of competency, which, like fee patents, enabled allottees to sell their land) to allottees found by the Secretary of the Interior to be capable of managing their own affairs. Some of these acts contained requirements that an application for the fee patent or certificate of competency be filed [8] while others did not.[9] Some acts contained an application requirement for one class of Indians but not for other classes.[10] Congress's decision to impose explicit application requirements in some of these acts but not in others, combined with its decision not to include an explicit application requirement in the Burke Act, supports the conclusion that Congress deliberately chose not to require an application under the Burke Act.

It is also clear that the Constitution does not require an allottee's consent for a fee patent to remove restrictions on alienation applicable to an allotment, although the allottee's consent may be required to terminate a tax exemption applicable to the allotment. In *Choate v. Trapp*, 224 U.S. 665 (1912), this Court found that:

> [*T*]*he exemption and nonalienability were two separate and distinct subjects.* One conferred a right and the other imposed a limitation. *The right to remove the restriction was in pursuance of the power under*

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[8] *See, e.g.*, Act of June 25, 1910, ch. 431, 36 Stat. 855 (requiring application for certificate of competency); Act of June 28, 1906, ch. 3572, 34 Stat. 539 (requiring a request and petition for certificate of competency); Act of June 14, 1906, ch. 3298, 34 Stat. 262, 263 (requiring applications for fee patents for lands within drainage districts); Act of July 1, 1902, ch. 1361, 32 Stat. 636 (requiring request of Kaw Indians for certificate authorizing sale of lands).

[9] *See, e.g.*, Act of May 27, 1908, ch. 199, 35 Stat. 312 (allowing removal of restrictions on lands of Five Civilized Tribes); Act of June 21, 1906, ch. 3504, 34 Stat. 325, 381 (allowing fee patents to be issued to Oneidas of Wisconsin). Some of the acts simply removed the restrictions on alienation by decree. *See, e.g.*, Act of June 21, 1906, ch. 3504, 34 Stat. 325, 363 (decreeing removal of restrictions on lands of nonresident Kickapoo Indians).

[10] *See* Act of June 21, 1906, ch. 3504, 34 Stat. 325, 353. The Clapp Amendment required applications by full-blood Indians but not by adult mixed-blood Indians.

> *which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability.* But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant.

224 U.S. at 673 (emphasis added). Thus, while the tax exemption accompanying an allotment is a vested property right protected by the fifth amendment that cannot be terminated without the allottee's consent, *id.* at 674, restrictions on alienation are not property rights protected by the fifth amendment.

After *Choate*, this Court reaffirmed that restrictions on alienation and tax exemptions are distinct, and that while tax exemptions are protected property rights, restrictions on alienation are not. *See Williams v. Johnson*, 239 U.S. 414 (1915); *see also United States v. Benewah County*, 290 F. 628, 631 (9th Cir. 1923). In other decisions, this Court has repeatedly approved congressional removals of restrictions on alienation without the consent of the allottees.[11] These decisions make it manifestly clear that the unilateral removal of restrictions on alienation by Congress infringes no constitutional right of the allottees.[12]

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[11] *See Jones v. Prairie Oil & Gas Co.*, 273 U.S. 195, 199 (1927) (Justice Holmes held that "[i]t is not open to dispute that the removal . . . of the restriction upon alienation previously imposed, is valid"); *United States v. Waller*, 243 U.S. 452, 459-60 (1917); *see also Fink v. Board of County Comm'rs*, 248 U.S. 399, 404 (1919); *United States v. First Nat'l Bank*, 234 U.S. 245, 259 (1914).

[12] Assuming for the sake of argument that consent by the allottee to the removal of restrictions on alienation is required, subsequent consent—evidenced by the sale or mortgage by the allottee of the land covered by the patent—satisfies the consent requirement. Since no court has ever held that consent by the allottee is required in order to remove restrictions on alienation applicable to allotments, no court has ever considered directly what actions by the allottee satisfy such a consent requirement. This Court has considered a consent requirement in connection with the removal of tax exemptions applicable to allotments, however, and ruled that actions taken subsequent to the issuance of the fee patent can sup-

B. The Secretary of the Interior Acted Within His Authority in Determining the Competency of Allottees Based on Blood Quantum

The second major argument raised by the petitioners is that the fee patents are void because the Secretary of the Interior relied on factors such as the allottee's degree of Indian blood in making his determination whether to issue a fee patent, rather than making an "individual" determination of the allottee's competency. The text of the Burke Act, however, states simply that the Secretary is authorized to issue a fee patent "whenever he shall be satisfied" that an allottee is competent. The Act does not require an individual determination of competency, nor does it impose any other limitations on the Secretary's discretion in "satisfying" himself that an allottee was competent.

During the forced fee policy period Congress itself used degree of Indian blood as an indicator of competency,[13]

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ply the requisite consent. *See County of Mahnomen v. United States*, 319 U.S. 474, 477-78 (1943); *see also United States v. Frisbee*, 165 F. Supp. 883, 889-91 (D. Mont. 1958); *United States v. Glacier County*, 74 F. Supp. 745, 749 (D. Mont. 1947). If an allottee can subsequently consent to the removal of a tax exemption covering an allotment, it follows that an allottee can subsequently consent to the removal of restrictions on alienation applicable to an allotment.

Congress has also viewed subsequent consent, as evidenced by actions such as the voluntary sale or mortgage of patented lands, as sufficient to satisfy any consent requirements. *See* 25 U.S.C. §§ 352a, 352b (1982); H.R. Rep. No. 1896, 69th Cong., 2d Sess. 2 (1927) ("[p]lacing a voluntary encumbrance upon or disposing of land so patented must in law be considered as an acceptance of the fee patent and a waiver of the tax-exempt privileges of a trust patent . . . ."); H.R. Rep. No. 2269, 71st Cong., 3d Sess. 3 (1931) (where patented land "had been either mortgaged or sold by the Indian to whom the patent was issued, that such mortgage or sale, as the case might be, would amount to an acceptance of the patent and that he could not be heard to say that such patent had been improperly issued").

[13] *See* Act of May 27, 1908, ch. 199, 35 Stat. 312 (distinguishing between lands held by individuals with varying degrees of Indian

and this Court upheld the practice. *See United States v. Waller*, 243 U.S. 452, 462 (1917); *see also United States v. First National Bank*, 234 U.S. 245 (1914). The decision in *Waller* demonstrates that the Department's mixed-blood policy under the Burke Act was within the Secretary's authority.

Petitioners rely on two decisions of the Eighth Circuit, *United States v. Debell*, 227 F. 760 (8th Cir. 1915), and *Baker v. United States*, 276 F. 283 (8th Cir. 1921), to support their argument that the Burke Act required an individual determination of competency. Cert. Pet. at 18-19. Apart from the fact that the Eighth Circuit itself did not view its decision in the instant case as in conflict with these prior decisions, the petitioners' reliance on these decisions is misplaced because neither holds that an individual determination of competency is necessary and both support the dismissal of the forced fee claims against the non-federal defendants.

In *Debell*, a decision that antedated the forced fee policy, the Eighth Circuit determined what constituted competency for purposes of the Burke Act, but did not address what procedural steps, if any, the Secretary of the Interior was required to use in order to determine competency. The fee patent at issue in *Debell*, which was predicated upon a competency determination based on fraudulent representations and upon a substantive competency standard that the court found erroneous as a matter of law, was subsequently transferred to an innocent purchaser who had no notice of these defects. The court ruled that the purchaser was protected by the bona fide purchaser doctrine and stated that

> the United States and all parties claiming through or under [the patent] are thereby estopped from assailing the patent or the title under it as against such an innocent purchaser. The title of a bona fide purchaser

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blood in establishing procedures for removal of restrictions on alienation); Act of June 21, 1906, ch. 3504, 34 Stat. 325, 353 (requiring applications by full-blood Indians but not mixed-blood Indians for the removal of restrictions on alienation).

> of land subsequent to the issue of the patent is superior to the equitable claim of the United States to avoid it for fraud or error of law in the issue of it.

227 F. at 763. The *Debell* court stated that the conveyance from the allottee to Debell, the party involved in the fraud, "was voidable, but it was not void because the United States had issued to [the allottee] its patent in fee simple." *Id.* at 771.

Baker, the other case relied upon by the petitioners, involved the issuance of fee patents to heirs of Indian allottees after competency determinations based upon fraudulent information. While the Eighth Circuit upheld the criminal convictions of the fraudulent parties, it also stated that the United States could recover the title to the lands only "if the title had not in the meantime passed into the hands of an innocent purchaser." 276 F. at 285.

Debell and *Baker* do not support the petitioners' assertion that erroneous competency determinations render fee patents void. These decisions instead support the Eighth Circuit's determination that the forced fee patents were at most voidable and that the forced fee claims should not be permitted to proceed against the non-federal defendants, who are innocent purchasers.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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